No. 573

In the Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL STEEL PRODUCTS, INC., AND CROWN FLEX OF NORTH CAROLINA, INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC.

LEWIS P. HAMLIN, JR.
Wachovia Building
Salisbury, North Carolina 28144
Attorney for General Steel Products, Inc., and Crown Flex of North Carolina, Inc.

INDEX

CITATIONS

CASES:

STATUTES:

MISCELLANEOUS:

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL STEEL PRODUCTS, INC., AND CROWN FLEX OF NORTH CAROLINA, INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR GENERAL STEEL PRODUCTS, INC.[1] AND CROWN FLEX OF NORTH CAROLINA, INC.

QUESTION PRESENTED

We must resist the tenor of the "Question Presented" as stated in the brief of the National Labor Relations Board, since we think it does not fairly embody the position of the Court of Appeals for the Fourth Circuit.

1. General Steel Products, Inc., and Crown Flex of North Carolina Inc., have merged since this case was tried, under the name and charter of General Steel Products, Inc. We do not think that this changes any of the issues presented here.

These cases in which Writ of Certiorari has been granted under No. 573 are all *per curiam* decisions. (A. I 316; A. II 553; A. III 893) The rationale of the Court of Appeals for the Fourth Circuit can only be discovered by turning to the antecedent decisions on which these cases are based. They are: *NLRB v. S. S. Logan Packing Co.*, 386 F. 2d 562; *Crawford Mfg. Co. v. NLRB*, 386 F. 2d 367, cert. denied, 390 U. S. 1028; *NLRB v. Sehon Stevenson Co., Inc.*, 386 F 2d. 551. This Court denied certiorari in the *Crawford* case; no Petition for Certiorari was filed in the *Logan* case (which is the principal case); and the Court of Appeals for the Fourth Circuit enforced the Board's order to bargain in *Sehon Stevenson*.

The question posed by the Petition for Certiorari implies that the Court of Appeals for the Fourth Circuit has held that an employer can *never* be required to bargain with a union unless it has won an election, "irrespective" of unfair labor practices of the employer. This is not a fair appraisal of the decisions. The Court of Appeals has said in these antecedent cases that an election is the method selected by Congress for determining questions of representation, which the Board must follow so long as a valid election can be held; but it has further said that recognition and bargaining can be required without an election: (1) where the employer has confirmed and acknowledged the union's majority (*Sehon Stevenson* case) or (2) if it is shown that the employer's misconduct is so extensive and pervasive as to prevent the conduct of a valid secret election. (See *Logan* case and the present decisions.) The *Sehon Stevenson* case is, as we believe and expect to show, in accord with the views of this Court as expressed in *United Mine Workers*

v. Arkansas Oak Flooring Co. 351 U. S. 62. Whether the Labor Board has authority, at all or in any event, to install a labor union whose majority has not been recognized and which cannot win the majority support of employees in an election, is a question which we think is seriously in doubt under the Act.

What is at stake here in the *General Steel* case is the validity and application of the Labor Board's decision in *Bernel Foam Products Co.* 146 NLRB 1277 and other cases following it, under which the Board increasingly through card-check proceedings, is imposing unionization upon employers and upon their employees *after the union has been rejected by the employees in a secret election.*

STATEMENT OF CASE

In *General Steel,* (unlike the other cases consolidated for hearing under No. 573) the union lost a secret ballot election conducted by the National Labor Relations Board. The vote was 94 to 83 with 13 challenged ballots (A. III 563). Two challenges were resolved by the Regional Director as not being entitled to vote and it was unnecessary to resolve the others. After losing the election the union filed charges alleging violations of Sections 8 (a) (1) and 8 (a) (5) of the National Labor Relations Act, 29 U S C Sec. 158 (a) (1) and (5), and moved to set the election aside.

In *General Steel* there was no allegation that any individual was improperly discharged or otherwise discriminated against in voliation of Section 8 (a) (3) of the Act. Solely on the basis of alleged coercion of employees, the Board reached its conclusion that this employer should be com-

pelled to recognize and bargain with the union, contrary to the desires expressed by its employees in the election.

The election was set aside but no new election has ever been held. On the contrary, the Board in its Order adopting the Trial Examiner's recommendations dismissed the Election Petition and vacated all proceedings in connection therewith (A. III 560). It did this notwithstanding its earlier determination that: "A question affecting commerce exists concerning the representation of certain employees of the employer . . . " (A. III 601)

Here, we take it, is evidence that the Board considers an order to bargain the practical equivalent of having held an election which was won by the union - or at least as a satisfactory substitute in the circumstances for having held an election, thus resolving the question concerning representation which it had previously found to exist.

Contrary to the implication of arguments advanced throughout the Board Brief (Bd. Br. 14, 20, 24, 28, 31, 58 n. 58) neither the Trial Examiner nor the Board ever made any finding in *General Steel* that a fair and valid re-run election could not be held, to confirm the true desires of the employees. The conclusion to be drawn from the record as a whole is surely to the contrary; and the Fourth Circuit specifically so held. It said (A. III 894 n.3):

> "Whether or not the election actually held was properly held invalid, we do not decide, but the 8 (a) (1) violations found to have occurred were not so pervasive that available remedies were not reasonably calculated to assure a 'free exercise of the employees' choice by secret ballot

rather than by resort to a count of questionable cards."

The Trial examiner determined that there were 207 employees in the "unit" on the date of the union's demand, of 229 employees on the payroll (A. III 576). Out of this number, the Trial Examiner found that, in the course of some *five months*, (A. III 565-7) four employees had been improperly interrogated, of whom two were threatened (possibly in jest), four others threatened, all by lower echelon supervisors, another tasteless incident where the issue of race was injected in remarks to one man in the presence of four or five others.[2] The Shipping Department foreman told some employees under him that they were *free to vote as they pleased*, but that some people might not buy products of a union shop or wish to hire employees who came from a union shop (A. III 566). Another employee was told that the union would do "more harm than good," and similar language was contained in a company poster which has been held proper as an exercise of free speech. *NLRB v. Threads, Inc.* 308 F. 2d 1. (CA4, 1962). A company executive made a pre-election speech to assembled employees, and on the testimony of four out of some two hundred (denied by the employer, A. III 873-5) he is found to have said that if the union came in he would "negotiate, negotiate, negotiate" and did not have to sign anything and that employees who went on

2. Only the one man took the conversation seriously as far as the record shows; the supervisor explained it as a joke that had originated among the other employees (A. III 890-91. This supervisor had been demoted to a rank and file job before the election. Transcript 1754.

strike would be fin ed and new employees hired to take their places. (A. III 570-71).[3]

The foregoing is a summary of alleged misconduct by this employer over a five-month period, as found by the Board. The Circuit Court refrained from deciding whether the Board was justified in setting the election aside, but was emphatic in holding that this was not sufficient basis for the Board to install a union over the wishes of employees expressed in a secret ballot and to refuse to hold a further election.

SUMMARY OF ARGUMENT

The National Labor Relations Board has no authority to determine questions of representation in an unfair labor practice case by means of a count of union authorization cards. This authority, which it formerly possessed, was taken away by the Taft-Hartley Amendments to the Act. It has nevertheless continued to exercise this power and has improperly done so in the *General Steel* case. This practice is destructive of employee rights of self organization as guaranteed by the National Labor Relations Act.

Card-check cases are irreconcilable with other policies of the Board and with a serious purpose to determine and protect employees' selections of their own bargaining agents. Cards are signed under a great variety of circumstances and, as compared with a secret ballot election, they are notorious-

---

3. Two long letters had been written to employees explaining, among other things, the right of the employer to *replace* strikers; and there was no charge or finding that the letters were coercive. The speeches were mainly a reading of these letters. (A. III 571).

ly unreliable as an indication of employee desires. Card check cases, as administered by the Board, destroy the opportunity of employees to hear both sides of the question before "voting" and deny to the employees the right to change their minds and withdraw their cards after hearing counter-arguments.

Even assuming that card-check cases are within the power of the Board and consistent with the administration of the Act, the Order to bargain directed against *General Steel* cannot be sustained. The Board failed to hold a new election, after the union had lost the first, and under circumstances where, as the Court of Appeals for the Fourth Circuit found, a re-run election could have been held to determine the true desires of the employees. The Board's finding that the employer lacked a good faith doubt of the union's majority is unsupported by substantial evidence. Such information about this as the employer was able to gain led him to the opposite conclusion.

A majority of cards was erroneously counted in favor of the union. These cards had been obtained under representations that they would be used to obtain an election in which employees would have an opportunity to vote either way, and representations that the cards would otherwise be kept secret. These facts were altogether inconsistent with the counting of such cards as votes for the union.

ARGUMENT

I. Where A Question Concerning Representation Exists, As In The General Steel Case, The National Labor Relations Board Has No Authority To Determine Such Question By A Card-Check Proceeding.

The Wagner Act, Sec. 9 (c), originally gave the Board broad discretion in selecting procedures for determining questions of representation. (49 Stat. 453):

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, *either in conjunction with a proceeding under section* 10 *or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.*" (Emphasis added)

Thus, not only did the Wagner Act allow the Board to use a secret ballot or "*any other suitable method*," it also authorized the determination to be made in an *unfair labor practice proceeding* under Section 10. This was entirely changed by the Taft-Hartley amendment in 1947 (61 Stat. 143), and Section 9 (c) now reads as follows, in pertinent part:

> "(c) (1) Whenever a petition shall have been

filed, in accordance with such regulations as may be prescribed by the Board -

* * *

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereof. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

After the enactment of Taft-Hartley the Board acknowleged in its Annual Report for 1948 the change in its authority:

> "Section 9 (c) of the act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed (but rarely exercised) to utilize other 'suitable means' of ascertaining representatives." 13 NLRB Annual Report 32 (1948).

Similarly, in the same report, the Board took note of provisions denying certification to unions which failed to file noncommunist affidavits and, in language still highly pertinent to our present problem, observed:

> ". . . an order to bargain is often tantamount in practice to a certification of the union as bar-

> gain representative and that, just as the Board may not issue a certification to a non-complying union, so it should not issue an order requiring an employer to bargain with such a union." Id. p. 49.

Thus, we think it was the clear effect of Taft-Hartley, as well as the understanding of those who interpreted it for the Board at the time, that the secret ballot was to be the exclusive procedure for designating or selecting bargaining representatives. See "Union Authorization Cards" *75 Yale L. J.* 805; cf. *NLRB v. S. E. Nichols Co.* 380 F. 2d 438, n. 1 p. 441.

One might assume that this change in the law, and the Board's recognition of it, would have brought about an equivalent change in the Board's procedures; and, in fact, there appear to have been few card-check cases in the 1950's, although the Board did assert the right, based on meager analysis of legislative history, to continue issuing card-check bargaining orders. *Brown Truck & Trailer Mfg. Co.,* 106 NLRB 999. Increasingly, however, in the 60's the unions and the Board have been turning to unfair labor practice charges with card-check proceedings, to require recognition of a union and bargaining without an election; and in 1964, the Board was emboldened to reinstitute its former practice, abandoned ten years before,[4] of allowing unions to bring such charges *even after losing an election among the employees,* and even though based on circumstances known to the union before the election was held. *Bernel Foam Products, Co.,* 146 NLRB 1277.

---

4. *Aiello Dairy Farms,* 110 NLRB 1365.

This of course had the effect of giving unions "two bites" and greatly increased the attractiveness of these proceedings to them, with the accompanying opportunity to gain bargaining rights over an unwilling majority of employees, who had once signed cards but later voted against the union. The card check came to be regarded by unions as an alternate method of obtaining certification. See *Schlossberg* (General Counsel United Automobile Workers) *Organizing and the Law* (BNA 1967) p. 82:

> "The legislative history of Taft-Hartley makes it clear that this change was intended to preclude Board certification based on cards. As this chapter will demonstrate, however, an 'indirect certification' on cards is possible through Board bargaining orders."

The Board in its present Brief (pp. 32-33) turns to analysis of legislative history to support its assertion that Congress intended to leave intact the card-check bargaining-order procedures that had existed before Taft-Hartley. True, the House Bill contained a proposed amendment to Sec. 8(a)(5) which would have made it an unfair labor practice for an employer to refuse to bargain *only* where a union was currently recognized or certified under Section 9. This amendment did not emerge from the House-Senate conference, and Section 8(a)(5) was left intact. The conference report did not say why; in fact it erroneously reported that neither the House nor Senate revisions had changed Sec. 8(a)(5).[5] This may have been "legis-

5. H. R. Conf. Rep. No. 510, 80th Congress, 1st Sess. 41 (1947); 1 *Legislative History of the Labor Management Relations Act of 1947* p. 1013.

lative oversight" as has been suggested, or more likely it was felt that Section 9(a), as referred to in 8(a)(5) was merely "definitional" as to representatives "designated or selected" and that the complete revision of Sec. 9(c) took care of how representatives were to be designated or selected.[6] The brief reference by Senator Taft quoted in the Board's Brief, p. 33 refers to ". . . subsection 8(5) relating to collective bargaining," as not having been changed.[7] This shows that Senator Taft looked upon this section as having to do with *bargaining* rather than *recognition.* Certainly it is clear that no conferee nor any member of the House or Senate suggested that Sec. 8(a)(5) was left intact in order to preserve the Board's card check procedures, or to preserve the Board's "good faith doubt" doctrine, and nobody suggested that leaving 8(a)(5) intact would detract in any way from the objective of the amendment to Sec. 9(c) which elaborately provided for an election as the only method of resolving questions of representation, nor from Sec. 9(c)(1)(B) which for the first time gave *employers* the right to petition for an election upon being presented with a claim by a union to be recognized "as the representative defined in section 9(a)".[8] There was no dissent from the premise that bargaining representatives should be chosen by election, even

---

6. See *McFarland and Bishop, Union Authorization Cards and the NLRB* (Univ. Penna., Wharton School, 1969) p. 27; Comment, *Union Authorization Cards,* 75 YALE L.J. 805, 835 (1966)

7. 93 Cong. Rec. 6600, 2 Leg. Hist. (1947) 1539.

8. A thorough analysis of the legislative history of the Act will be found in *McFarland and Bishop, Union Authorization Cards and the NLRB* (Univ. Penna. Wharton School, 1969) p. 18 et seq.

among those who voted against Taft-Hartley.[9] Surely the Senators and Representatives felt they had done enough to accomplish their objective. By striking out old Sec. 9(c) they had taken away the language under which the Board was authorized to determine the representatives *"designated or selected"* by "any other suitable method" than an election. They had also taken away the Board's authority to make the determination in an unfair labor practice proceeding under section 10. This last change has been entirely overlooked and is unexplained by the Board in its subsequent conduct of card check cases, all of them as unfair labor practice proceedings. The legislative history does not lend significant support to the Board, despite its able and labored effort to harvest every innuendo. Congress did not go through all of this merely to leave things as they had been before. This is essentially the position which the Board is now defending."

As matters now stand, the Board, while giving lip service to the law that it must decide "questions of representation" only through an election, has continued to pursue the fiction that no such question *exists* where it finds that the employer lacked a "good faith doubt" of the union's

---

9. Ibid pp. 25-6, 28.

10. Long before Taft-Hartley the Board had turned to the election as its preferred procedure, deeming them more reliable than cards. See *The General Box Co.*, 82 NLRB 678, 683, citing *Cudahy Packing Co.*, 13 NLRB 526, 531-2 and *Armour & Co.*, 13 NLRB 567 (1939); see 13 *NLRB Annual Report* 32 (1948): *McFarland and Bishop, Union Authorization Cards and the NLRB*, pp. 13-14, 25. As early as 1939 the Board had invented its "good faith doubt" test for determining whether an employer was entitled to an election. *Chicago Apparatus Co.*, 12 NLRB 1002 (1939)

majority. It thus makes the right of the employees to select or not select their own representative by secret ballot to depend upon the Board's "finding" as to what was in the mind of the employer. This has been generally defended by the Board as resting upon the tenuous legislative history referred to above and upon language of this Court in *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62, 100 L. Ed 941, 947. 76 S. Ct. 559:

> ". . . In the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated Sec. 8 (a) (5) of the Act."

This case does not support, and we submit was never meant to support, the structure which the Board has sought to erect upon it. In *Arkansas Oak Flooring* there had been no election; the union possessed cards from 174 of 225 employees *stipulated* to be validly signed by the employees involved. The employer knew and admitted that the union had majority support. There was indeed no "question of representation." The employer was endeavoring to defeat the union by obtaining a state court injunction. The holding of this Court (which is off-point as far as the present case is concerned) was that the dispute fell within the National Labor Relations Act, notwithstanding failure of the union to file non-communist affidavits, since there was no need to go to the Board for an election; and therefore that a state

court was preempted and could not intervene by an injunction against peaceful picketing."

The Act speaks in terms of "a question of representation," and this Court in *Arkansas Oak Flooring* spoke of a bona fide dispute *"as to the existence of the required majority."* The Board, however, in building upon the case, has changed the nature of the inquiry and now exhibits little interest in whether there is an actual question concerning the adherence of the *employees* to the union. Instead, it is interested in the general attitude and conduct of the *employer*, and if it finds unfair labor practices on his part, *however unrelated logically to the union's standing among the employees, or to the employer's knowledge of it*, the Board generally concludes, and concluded in the *General Steel* case, that the employer was acting in bad faith and therefore must have "known" (non sequitur) that the union had a majority all along. This holding the Court of Appeals refused to sustain. The present Petition for Certiorari acknowledges that this is precisely the Board's approach (Petition p. 10):

---

11. The Board also briefs at length *Franks Bros. Co. v. National Labor Relations Board* 321 U. S. 702 (1944) (Bd. Br. 39 et seq.) In this case, *decided before Taft Hartley*, the Court upheld a bargaining order based on cards. But under the law at that time the Board had authority to ascertain representatives by any suitable method. The case was concerned with the appropriateness of a bargaining order as a remedy for extensive unfair labor practices causing a loss of majority, and held that loss of majority did not prevent the Board from entering the order. But this case is not authority for the primary proposition that the Board is now trying to sustain, namely that the Board still has authority after Taft Hartley to select a representative in a card-check unfair labor practice case. See the able analysis in "Union Authorization Cards" 75 *Yale L. J.* 805; cf. *National Labor Relations Board v. S. E. Nichols Co.* 380 F. 2d 438, 441 n. 1.

> "In each case the Board based its conclusion that the Company did not have a good faith doubt as to the Union's majority status on the fact that the Company had committed substantial unfair labor practices during its anti-union campaign."[12]

The Board Brief advances the same theory (p. 18 et seq.). Surely this is nonsense, for an employer who is convinced that a union has not achieved majority may be just as interested in dissuading his employees as one who is convinced that the union has full support. *National Labor Relations Board v. River Togs, Inc.*, 382 F. 2d 198, (C.A. 2); *National Labor Relations Board v. James Thompson & Co.*, per Judge L. Hand, 208 F. 2d 743 at 746, (C.A. 2); *Montgomery Ward & Co. v. National Labor Relations Board*, 377 F. 2d 452, (C.A. 6); *National Labor Relations Board v. Ben Duthler, Inc.*, 395 F. 2d 28, (C.A. 6); *National Labor Relations Board v. S. S. Logan Packing Co.*, 386 F. 2d 562, (C.A. 4)

Noteworthy too, along with failure of the Board to conduct a re-run election in *General Steel* or to make any finding that a valid election could not be conducted, is the

---

12. In fact the Board Brief goes even further and says (P. 18): ". . . the employer's other unfair labor practices are a relevant factor in determining *whether he relied upon* such a doubt in refusing to bargain." (emphasis added.) Thus, the Board is saying that it will impose unionization upon employers not only where the employer is without a "good faith doubt" but also where he did not *rely upon* this doubt. Here is certainly a total abandonment by the Board of its obligation to permit *employees* to determine questions of representation, when it is willing to issue a bargaining order even though there was a real "doubt" which the employer failed to rely upon.

Board's further failure to consider or resort to an injunction proceeding as authorized by Congress in Section 10 (j) of the Act. If indeed there were unfair labor practices such as to frustrate a fair election, Congress provided this remedy in the Taft-Hartley Amendments for controlling such situations, for restoring a proper atmosphere under which an election could be held. Again the Board prefers not to use the procedure laid down by Congress.

The Court of Appeals for the Fourth Circuit held in its decision in *Sehon Steveson*, 386 F. 2d 551, that where the union's majority support is known to the employer and is truly undisputed, the employer must recognize it without an election. This is in accord with the decision of this Court in *Arkansas Oak Flooring* and not at variance with it. Where there is a question, however, we submit the employees are entitled to an opportunity for a secret vote, and the employer is likewise entitled to the results of such a ballot. The Board should not be allowed to destroy these rights by engaging in labored construction of the Act or the evidence for the purpose of concluding that there is "no question" to be resolved. *National Labor Relations Board v. S. S. Logan Packing Co.*, 386 F 2d 562, (C.A. 4); *National Labor Relations Board v. River Togs, Inc.*, 382 F 2d 198 (C.A. 2); *National Labor Relations Board v. Ben Duther, Inc.*, 395 F 2d 28, (C.A. 6); *Montgomery Ward & Co. v. National Labor Relations Board*, 377 F. 2d 452, (C.A. 6).

We would further urge that the mere possession by a union of a majority of signed cards and the employers knowledge of it ought not to be a basis for compelling recognition and refusing to hold an election. The employer too should

have his say, and the employees should have the benefit of it. He may well believe that the union majority is transitory, and may properly feel that the employees have made a mistake or have been misled or have made a poor choice of unions. We refer again in a later section of this brief to the Board's inconsistent administration of the Act in this regard. (Sec. II B, post p. 25)

The misplaced emphasis by the Board on the conflicting desires of the union organizer and the employer entirely neglects the interests of the *employees*, whose rights the Act was intended to protect. This is not due to any omission on the part of Congress. The Act is clear: The *employees* have the right of self organization, to bargain collectively through representatives of their own choosing;[13] employers are forbidden to interfere;[14] unions are forbidden to interfere;[15] and to assure complete freedom the Act adds that the employees' rights include the *right not to join a union* - the right "to refrain from any or all of such activities . . ."[16] The *Board* is given the duty of determining whether a question of representation exists, whereupon it "*shall*" hold an election and "*shall*" certify the results.[17] Instead of performing this duty the Board in card check cases engages in an esoteric inquiry to determine whether the employer really thought there was doubt about it - when surely the employer, of all the parties, is the one least likely to know - and then a further inquiry to determine whether the union possessed at some early

13. Act. Sec. 7, 61 Stat. 140, 29 U.S.C. § 157.
14. Act. Sec. 8 (a) (1), 61 Stat. 140, 29 U.S.C. § 158 (a) (1).
15. Act. Sec. 8 (b) (1), 61 Stat. 141, 29 U.S.C. § 158 (b) (1).
16. Act. Sec. 7, 61 Stat. 140, 29 U.S.C. § 157.
17. Act. Sec. 9 (c), 61 Stat. 143, 29 U.S.C. § 159.

stage a transitory majority of card signers—and these collected over a period of time so that they do not necessarily represent a majority on the day they are presented.

What we have been witnessing in the recent cases, we suggest, is a progressive disenchantment among the circuits with the direction which the Board is following. The most recent is probably the Circuit Court for the District of Columbia, which in the past has been among these showing the greatest deference to the Board. In *NLRB v. Henry I. Siegel Co., Inc.* decided January 9, 1969. ..... F. 2d ....., 70 LRRM 2207 (C.A.D.C. Nos. 21086, 21131, and 21316) that Court refused to enforce an order to bargain based on cards, after the union had lost an election. It directed the Board to go back and find out the true desires of the employees. We quote from the opinion (70 LRRM 2210-11):

> "The prime problem in the controversy is: What do the employees of Siegel at Eloy really choose in respect to a collective bargaining agent? We regard as peripheral many of the propositions posed and debated so vehemently in the papers before us and in the extensive literature key-numbered under this heading. Such off-target inquiries include: Did the employer say this or did he say that to the employees? Did the union organizers say definitely that an election would be held, or did they only clearly intimate it? Should these three votes be counted or should they not? * * * Did 51 per cent of the employees sign the cards or only 48 1/2 per cent of them? Did the Union organizer tell the employees the purpose of the cards was to get an election, or did

he only intimate that purpose? Did he say an election was a purpose, or the purpose, or the sole purpose? Did the president of the company say the plant would be abandoned, or did he say it might be abandoned? Were these three specified ballots valid or invalid? Who was afraid of what? * * * We think the consideration should be directed precisely at the prime question in the case: What was the real choice of these employees in respect to a collective agent?

"In the present case the Board frankly says it does not know what these employees choose. And there is ample justification for that skepticism. The Board also says that a "fair election" cannot be held in Eloy. But that averment is not impressive on the present record; we do not know upon what the conclusion is based, or what the Board means by "fair", or to whom. Does the Board mean fair to the Union, or fair to the employer, or fair to the employees? We suggest that the latter ought to be the point of interest, but we are not supplied with an account of circumstances which depict such a difficulty.

"The Board was in possession of flatly contradictory evidence. It has made no test or check of this evidence. It simply says it must accept one side. We think it should not. We think that in such circumstances the Board must inquire further. It must exert a careful, intelligent effort to ascertain what is the real choice of these employ-

ees. As we see it, that is its responsibility under the statute.

* * *

"We are of clear opinion that the Board is not restricted to the evidence shown by an unsupervised poll taken individually in private by agents of one of the interested parties, which is all the Board has before it now in this matter. The Board must ascertain and give effect to the real choice of these employees in respect to collective bargaining. It cannot avoid that responsibility upon such a paucity of evidence as this record contains."

The Court of Appeals for the District of Columbia did not order the Board to hold a new election, but surely this is the proper course under the law to carry out the Court's direction to give effect to the *real choice* of these employees.

A. REMEDIES OF THE BOARD ARE AMPLE AND NEGLECTED FOR DEALING WITH EMPLOYER INTERFERENCE

The Board in its Brief (pp. 41-43, 24, 31) seeks to confront this Court with a hard choice. It suggests that the Court must either sustain the Board's power to issue card-check orders under Sec. 8(a)(5) and approve its "good faith doubt" test, which it regards as a "settled gloss" upon the Act, or else see employer interference go uncorrected. We agree that employer interference should be corrected; we do not agree that the Board is so bereft of remedial powers or imagination in inventing or applying them that the only way it can get to the employer's conduct is by

destroying the right of the employer and the employees to an election. The Board has already demonstrated far more ingenuity than this, going beyond cease and desist orders, in cases where it could not resort to a card check because the union had not achieved majority status. See e.g. *J. P. Stevens & Co.*, 157 NLRB 869, mod. & enf. 380 F. 2d 292 (C.A. 2), cert. den. 389 U. S. 1005; *H. W. Elson Bottling Co.*, 155 NLRB 714, mod. & enf. 379 F. 2d 223 (CA6) —directing the mailing of notices to all employees signed by plant officials, reading of notices to employees in the plant during working time, giving union access to the plant to talk to assembled employees (under some circumstances) and access to plant bulletin boards. All these are in addition to the Board's neglected right to seek injunctions under Section 10(j) and thereby put the employer in contempt if misconduct is continued. These remedies are broad and effective and by no means inconsiderable; they have merely been neglected in favor of the Board's preference for a card-check bargaining order.[18]

---

18. The Board has no basis even by its own theories for issuing bargaining orders where the union has not achieved majority, and has never done so. (Cf. Bd. Br. p. 43 n. 45). Section 9(a) refers to representatives designated or selected *by a majority* of employees in a unit appropriate. It is an unfair labor practice for an employer to bargain with a minority union. *Garment Workers Union v. NLRB*, 366 U. S. 731; cf. *J. P. Stevens & Co.*, 163 NLRB No. 24.

II. Apart From Questions Of Legality, The Board's Card Check Cases Are Irreconcilable With Its Other Applications Of The Act Or With The Protection Of Employees Rights.

A. THE UNRELIABILITY OF CARDS:

When the Board conducts elections it insists upon so called "laboratory conditions" - an unlikely term which is hardly descriptive of any election - but as a minimum it always means a closely supervised secret balloting outside the presence of both the employer and the union organizer. This "laboratory" test for elections is impossible to reconcile with the totally unsupervised solicitation of cards by union professionals, under partisan conditions, where the "voter" is required to accept or reject in full view of those who solicit him. The unreliability of such expressions has been nowhere better summarized than by the Court of Appeals for the Fourth Circuit in *National Labor Relations Board v. Logan Packing Co.*, 386 F. 2d 562, 564-6 (C.A. 4): We quote a part of this opinion (footnotes omitted):

> "In stark contrast is a decisional rule that bypasses the election processes and places signed authorization cards on a parity with an affirmative vote in a secret election.
>
> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check', unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to

such card checks. This, the Board has fully recognized. So has the AFL-CIO. In 1962, Board Chairman McCullock presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the elections, while those having authorization cards from over seventy per cent of the employees won seventy-four per cent of the elections.

"The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time,

however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.

"An employer could not help but doubt the results of a card check as an indication of the wishes of employees, for there is nothing in the process to allay it. Unless the employer is extraordinary gullible and unimaginative, he will at least suspect unreliability in the cards, and their signatures. If he has no honest doubt of the Union's claim of support by a majority of the employees, it will be because of other evidence known to him not because of the card check."

B. LACK OF EMPLOYEE OPPORTUNITY TO HEAR BOTH SIDES:

When an election is to be held the Board now insists that the employer furnish the union in advance with a list of names and addresses of all employees. This is done to insure that the union will have a chance to communicate with them so that they may hear both sides and vote intelligently. The Board's reasoning is set out in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 61 LRRM 1217, 1218 (1966):

"Accordingly, we now establish a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties pursuant to Section 102.62 of the National Labor Relations Board Rules and Regulations or after the Regional Director or the

Board has directed an election pursuant to Section 102.67, 102.69, or Section 102.85 thereof, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

"The considerations that impel us to adopt the foregoing rule are these: The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly (are) matters which Congress entrusted to the Board alone. In discharging that trust, we regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to re-

> move the impediment to communication to which our new rule is directed."

Surely this contrasts strangely with the Board's willingness to count authorization cards solicited at a time when no election has even been set or called for and when, more often than not, the employee has been exposed only to the union's solicitations and with no opportunity to hear what the employer or anyone else has to say about it. The Board cannot explain away this anomaly by saying that card check cases only occur where there has been employer misconduct, for the Board will require an employer to bargain with a union on the basis of a check of cards without any coercive conduct at all on his part, if the Board finds that the refusal was not "motivated" by a doubt on his part that the union had a majority. *H. & W. Construction Co.*, 161 NLRB 852 (1966) (one member dissenting). Here is proof that the Board does not intend to give employees a chance to "hear the other side" once they have committed to a union by signing a card. The Board Brief in the present cases asserts this very position (Bd. Br. 18).

C. EMPLOYEES ARE DENIED THE OPPORTUNITY TO CHANGE THEIR MINDS:

A further evil in card check proceedings is that the *employee who signs a card is locked in.* He cannot get his card back or avoid its being counted by anything less than a formal application to the union (if this will do it). An application to the Board will not accomplish anything. *Arkansas Grain Corp.* 163 NLRB No. 92 (1967); (enf. denied other grds. 390 F. 2d 824);

This very thing happened in the present *General Steel* case. Ten employees endeavored to intervene through counsel

of their own before the Trial Examiner, declaring that they had changed their minds and had voted against the union and desired to have their cards suppressed (Trial Examiner's Exhibit I, A. III 609-11, 631). The motion to intervene was denied (A. III 631) and all but two of these cards were counted for the union (A. III 594-97)! Contrast this with a voter's right to change his mind even to the last minute before marking his ballot. The Trial Examiner solemnly recited: "... an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negate the overt action of having signed a card designating a union as bargaining agent." (A. III 579) and then he went on to analogize the signing of a union card to the signing of a binding contract (A. III 580). Thus we find the Board virtually holding that one who signs a union card has made a "contract" to vote for the union, at least if the matter reaches a card-check proceeding.

III. The Bargaining Order Against General Steel Cannot Be Sustained, Even Assuming The Legality And Appropriateness Of Card Check Proceedings.

A. FAILURE TO HOLD A NEW ELECTION:

We have already observed that the Board made no finding at all in this case that a valid re-run election could not be held, although the Board's brief implies that such a finding was made and, by implication, that this was a necessary

finding. (Bd. Br. 14, 20, 24, 28, 31 58 n. 58)[19] The Court of Appeals supplied the omission by finding for itself that available remedies could have assured the free exercise of the employees' choice by secret ballot under the circumstances disclosed by this record (A. III 894). This is ample ground for sustaining the decision of the Court of Appeals.

B. THE FINDING THAT THE EMPLOYER LACKED A "GOOD FAITH DOUBT" IS UNSUPPORTED:

The Trial Examiner and the Board found that *General Steel* lacked a good faith doubt of the union's majority (A. III 589-90, 560). This finding is not sustained on the record as a whole. *Universal Camera Corp. v. NLRB* 340 U. S. 474, 71 S. Ct. 456. The employer had no accurate means of assessing union strength. The union conducted its campaign in secret and assured the employees of secrecy (Trial Examiner Ex. 2, A. III 611, 632, 680, 806-7, 832). It wrote a letter to all employees in which it repeatedly spoke of the secrecy of their cards and a secret election to follow. (A. III 611):

> "Your Petition for a Secret Ballot Election has been filed. Your secret cards have been turned over to the Federal Government. . .

---

19. The Board Brief blurs the distinction which should be drawn between employer conduct justifying setting aside an election and conduct which might render a re-run election impossible (Br. 24, 28, 31), thus tending to equate the two. This is entirely unjustified considering the remedies available to the Board to restore a proper atmosphere and to control improper conduct of either the union or the employer, including even a Court injunction under Sec. 10 (j) of the Act where needed. Accord: *National Labor Relations Board v. Flomatic Corp.* 347 F. 2d 74 (CA 2).

* * *

"During the next few weeks while you are awaiting your secret vote election, . . .

* * *

"Your signed, secret card and your "X" Yes on a Government Secret Ballot is your democratic way . . .

* * *

"An overwhelming majority has already signed Secret Authorization Cards."

It is strange that this letter, admitted as a Trial Examiner's Exhibit (A. III 632) was never dealt with in the Decision of the Trial Examiner or the Board.

A union demand for recognition presents an insoluble choice for the employer in this situation. An employer is as much obligated under the Act to decline recognition of a minority union as to recognize one having a majority; and this obligation does not depend upon whether the employer himself wants a union or does not want it, nor upon the nature of the conduct in which the employer is engaged. The mere act of recognizing the minority union violates the Act, and good faith belief that the union represents a majority is irrelevant. *Garment Workers v. NLRB,* 366 U. S. 731, 6 L. Ed. 2d 762, 81 S. Ct. 1603.

In the present *General Steel* case, the employer certainly did not know (if such was true) that the union had a majority. The union made no offer of proof. It had concealed its support from the employer. (A. III 611, 632, 680, 806-7, 832). It was reasonable to assume that the union was itself uncertain. It filed 152 cards with the NLRB in support of

its petition. (A. III 848), but only 133 of these turned out to bear names of persons employed by these companies when demand was made, and now the Board is only willing to count 120 of these as valid designations of the union out of a total unit of 207 employees—even taking the Board's criteria for determining what cards to count. (A. III 576, 560 n 2, 594-97).

Uncertainty of the union is evidence that the employer too had reason to be uncertain. "Good faith is not a one-way street." *NLRB v. Laystrom Mfg. Co.*, 359 F. 2d 799, 801 (C.A. 7, 1966); see *NLRB v. Bonnie Enterprises*, 341 F. 2d 712 (C.A. 4, 1965). The closeness of the count (and the vote in the election) are themselves evidence that there was a bona fide question about representation. *NLRB v. A & P Tea Co.*, 346 F. 2 d 936, (C.A. 5, 1965); *NLRB v. Dan River Mills*, Inc. 274 F. 2d 381, (C.A. 5, 1960).

The union and the General Counsel offered no evidence of any other knowledge on the part of the employer. All of the evidence having any direct bearing came from the employer. The Executive Vice President of General Steel made an effort to find out the extent of union support by talking to "many many" employees, and having his foremen do so, although this is a legally hazardous procedure. (A. III 865, 866 et seq.) He named many such employees in the record. (A. III 868 et seq). The Trial Examiner ruled that the employer had a right to make inquiries after receiving the union's demand (A. III 869). See *NLRB v. Lorben Corp.* 345 F. 2d 346, (C.A. 2, 1965); *NLRB v. Trumbull Asphalt Co.*, 327 F. 2d 841, (C.A. 8, 1964). In fact, some Board decisions hold the employer under a duty to do so. *Kay*

Allen Classics, Inc. 152 NLRB No. 134, 59 LRRM 1308 (1965); *Sagamore Shirt Co.*, 153 NLRB No. 27, 59 LRRM 1474 (1965). But most courts have regarded this as a risky road for the employer. See e.g. *NLRB v. A & P Tea Co.*, 346 F. 2d 936, (C.A. 5, 1965); *NLRB v. Logan Packing Co.*, 386 F. 2d 562 (C.A. 4).

The result of this inquiry was the employer's conclusion that only about 30 percent of the employees really favored the union (A. III 867). Yet these efforts to learn the facts were rejected by the Trial Examiner and the Board without any contrary proof, under the general cloud of the employer's supposed "bad faith", (A. III 590) and the inquiries are themselves deemed a suspect activity on the part of the employer. The Board's attitude toward this impossible dilemma has been pointed out, and we could hardly add more. *Operating Engineers v. NLRB*, 353 F. 2d 852, 856 (C.A. D.C. 1965); See *NLRB v. A & P Tea Co.*, 346 F. 2d 936, 940 (C.A. 5, 1965); *NLRB v. Dan River Mills, Inc.*, 274 F. 2d 381, 388-9 (C.A. 5). There was ample basis in *General Steel* for the employer's doubt. The burden was on the General Counsel to prove otherwise and no proof was offered. *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (C.A. 2) and cases collected. The Trial Examiner erroneously placed the burden on the employer (A. III 590).

C. NUMEROUS CARDS WERE ERRONEOUSLY COUNTED AS VOTES FOR THE UNION IN THE GENERAL STEEL CASE AND THIS IS SO EVEN IF TESTED BY THE BOARD'S OWN SHIFTING RULES, AS NOW DELINEATED IN ITS BRIEF:

The customary approach of the Board to the counting of cards has been a mechanical one. If the card itself is un-

ambiguous it will be counted unless it is proved that the employee was told that the card will be used "only" to obtain an election or "just" to obtain an election. *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced 351 F. 2d 917 (C.A. 6). The Board has been critized for its reliance on this "magic words" test," and last year in *Levi Strauss and Co.* 172 NLRB No. 57, 68 LRRM 1338 (1968) the Board "explained" that it did not insist on the uses of such language *in haec verba* as long as the representations amounted to the same thing. We do not read *Levi Strauss* as making any change of substance in the Board's rule, but in any event it was decided more than two years after the Trial Examiner had decided General Steel, and he did not have the benefit of it. His approach could hardly have been more mechanical. See A. III 578-81. *Ninety-seven* cards (out of the union's supposed majority of 120) were counted on the basis of the following ruling of the Trial Examiner (A. III 580-81):

> "Accordingly, I reject Respondent's contention 'that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that *this* is the *absolute equivalent* of telling him that it will be used '*only*' for purpose of obtaining an election.'
>
> "With respect to the 97 employees named in the attached Appendix B Respondent in its brief

---

20. *National Labor Relations Board v. Swan Super Cleaners, Inc.*, 384 F. 2d 609, 617-18 (C.A. 6); *National Labor Relations Board v. S. E. Nichols Co.* 380 F. 2d 438, 442-45 (C.A. 2); *National Labor Relations Board v. Dan Howard Mfg. Co.* 390 F 2d 304, 308-9 (C.A. 7)

> contends, in substance, that their cards should be rejected because each of these employees was told one or more of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face."

Thus the Trial Examiner ruled that even though a man was told *all* of these things: that his card would be used to obtain an election, that it would otherwise remain secret and be shown to nobody but the Labor Board in connection with obtaining an election, and that notwithstanding signing the card he would remain uncommitted and free to vote either way-that still such cards may be counted as votes for the union. A majority of the cards in this case have been counted under this ruling.[21]

We think this is a clear error even under the Board's own rule as now set out in this brief, and certainly so under numerous decisions in the circuits. See 75 *Yale L. J.* 826-31; *Crawford Mfg. Co. v. NLRB* 386 F. 2d 367 (C.A. 4), cert. den. 390 U.S. 1028; *National Labor Relations Board v.*

---

21. On top of this, the Trial Examiner also counted six cards where the man testified he was told the card was "only" or "just" for an election (A. II 584 et seq.), on the ground that such testimony was elicited on cross examination by leading questions, which the Trial Examiner deemed to be unreliable.

Winn-Dixie Stores, 341 F. 2d 750, 754 (C.A. 6); *National Labor Relations Board v. Koehler*, 328 F. 2d 770 (C.A. 7); *Bauer Welding & Metal Fabricators v. National Labor Relations Board*, 358 F. 2d 766, 62 LRRM 2022 (C.A. 8); *National Labor Relations Board v. Swan Super Cleaners, Inc.*, 384 F. 2d 609, 617-18 (C.A. 6); *National Labor Relations Board v. S. E. Nichols Co.*, 380 F. 2d 438, 442-45 (C.A. 2); *National Labor Relations Board v. Dan Howard Mfg. Co.* 390 F. 2d 304, 308-9 (C.A. 7)

In the *Bauer Welding & Metal Fabricators* case, *supra* the union had solicited cards by means of a letter which spoke of obtaining an election and assured the employees: "Your employer will never see theses cards". Although the cards themselves were an unambiguous designation of the union as bargaining agent, the Court regarded the letter as a "skillful attempt at misrepresentation" when the cards were later sought to be used in a card check proceeding. Enforcement of the Board's Order was denied. In accord also is the case of *Phelps-Dodge Corp. v. NLRB*, 354 F. 2d 591 (C.A. 7, 1965). In that case the court declined to enforce the Board's bargaining order where the union had inspired the employees to conceal from the employer the facts as to whether they had signed union cards, thereby deceiving him as to the union's strength when demand for recognition was made.

Nor is this matter of secrecy something to be lightly passed over from the standpoint of the employees. The integrity of the Board proceeding is involved. These employees were promised secrecy. The processes of the Board have been used here, we suggest, to further a deception by the

union, at the expense of the men it sought to organize, and to whom it made promises which have now been broken. If, to get these men to sign cards, the union promised that they would not have to stand up and be counted, then the union ought not be allowed to avail itself of the Board's writ to stand them up and count them against their will. The Board doubtless will say that this argument would come with more grace from an employee, rather than the employer whom it is accusing of misconduct, but here several employees did attempt to intervene and their petition was denied (A. III 631). At another point Board counsel asserted, "Well I don't see where the union's good faith has much to do with it. It is not a real issue in the case." (A. III 797) We think this is wrong. Surely this is a case in which the utmost good faith is demanded. The union's display of something less should not be rewarded by certification or its equivalent. *NLRB v. Bonnie Enterprises*, 341 F. 2d 712, (C.A. 4, 1965).

CONCLUSION

The judgment of the Court of Appeals denying enforcement of the Board's bargaining order directed to General Steel Products, Inc. and Crown Flex of North Carolina, Inc. should be affirmed.

Respectfully submitted.

LEWIS P. HAMLIN, JR.
Wachovia Building (P.O. 23)
Salisbury, North Carolina 28144

March 1969